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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 **Gilbert Anthony Padilla,**)
9)
10 **Plaintiff,**)
11) CIV 08-00250 PHX PGR MEA
12 **v.**)
13 **Gilbert Gandara, Michael**) REPORT AND RECOMMENDATION
14 **Davidson, Rodolph Castillo,**) FOR DISMISSAL
15) WITHOUT PREJUDICE
16 **Defendants.**)
17)

18 **TO THE HONORABLE PAUL G. ROSENBLATT:**

19 Plaintiff filed his complaint on February 7, 2008. On
20 March 27, 2008, the Court ordered Plaintiff to complete and
21 return a service packet for Defendant to the Court by April 16,
22 2008. That order warned Plaintiff that his failure to timely
23 comply with the provisions of the order would result in the
24 dismissal of the complaint pursuant to Rule 41(b), Federal Rules
25 of Civil Procedure.

26 Plaintiff was warned that his failure to acquire a
27 waiver of service from Defendants or to complete service of
28 process on Defendants within 120 days of the date of he filed
his complaint, by June 5, 2007, would result in the dismissal of
the complaint pursuant to Rule 4(m), Federal Rules of Civil
Procedure, and Rule 16.2(b)(2)(B), of the United States District
Court for the District of Arizona Local Rules of Civil

1 Procedure. The civil docket in this matter indicates that
2 Plaintiff has failed to return service packets to the Court, or
3 acquire a waiver of service from Defendants or to complete
4 service of process on Defendants.

5 On June 6, 2008, the Court allowed Plaintiff until July
6 7, 2008, to show cause why this case should not be dismissed for
7 Plaintiff's failure to comply with the Court's order of March
8 27, 2008, and Plaintiff's failure to effect service of process
9 on Defendants as required by the Court's order of March 27,
10 2008, and Rule 4, Federal Rules of Civil Procedure. Plaintiff
11 has failed to show cause for his failure to abide by the Court's
12 orders and to effect service of process on Defendants. The
13 Order to Show Cause sent to Plaintiff at his last known address
14 was returned as undeliverable.

15 Rule 3.4, Local Rules of Civil Procedure for the United
16 States District Court for the District of Arizona requires
17 prisoner-litigants to comply with instructions attached to the
18 Court-approved complaint form for use in section 1983 actions.
19 Those instructions provide: "You must immediately notify the
20 clerk ... in writing of any change in your mailing address.
21 Failure to notify the court of any change in your mailing
22 address may result in the dismissal of your case."

23 Plaintiff has a general duty to prosecute this case.
24 Fidelity Phila. Trust Co. v. Pioche Mines Consol., Inc., 587
25 F.2d 27, 29 (9th Cir. 1978). In this regard, it is the duty of
26 a plaintiff who has filed a *pro se* action to keep the Court
27 apprised of his current address and to comply with the Court's

1 orders in a timely fashion. This Court does not have an
2 affirmative obligation to locate Plaintiff. "A party, not the
3 district court, bears the burden of keeping the court apprised
4 of any changes in his mailing address." Carey v. King, 856 F.2d
5 1439, 1441 (9th Cir. 1988). Plaintiff's failure to keep the
6 Court informed of his new address constitutes failure to
7 prosecute.

8 Rule 41(b) of the Federal Rules of Civil Procedure
9 provides that "[f]or failure of the plaintiff to prosecute or to
10 comply with these rules or any order of court, a defendant may
11 move for dismissal of an action." In Link v. Wabash Railroad
12 Co., 370 U.S. 626, 629-31 (1962), the Supreme Court recognized
13 that a federal district court has the inherent power to dismiss
14 a case *sua sponte* for failure to prosecute, even though the
15 language of Rule 41(b) of the Federal Rules of Civil Procedure
16 appears to require a motion from a party. Moreover, in
17 appropriate circumstances, the Court may dismiss a complaint for
18 failure to prosecute even without notice or hearing. Id. at
19 633.

20 In determining whether Plaintiff's failure to prosecute
21 warrants dismissal of the case, the Court must weigh the
22 following five factors: "(1) the public's interest in
23 expeditious resolution of litigation; (2) the court's need to
24 manage its docket; (3) the risk of prejudice to the defendants;
25 (4) the public policy favoring disposition of cases on their
26 merits; and (5) the availability of less drastic sanctions."
Carey, 856 F.2d at 1440 (quoting Henderson v. Duncan, 779 F.2d

1 1421, 1423 (9th Cir. 1986)). "The first two of these factors
2 favor the imposition of sanctions in most cases, while the
3 fourth factor cuts against a default or dismissal sanction.
4 Thus the key factors are prejudice and availability of lesser
5 sanctions." Wanderer v. Johnson, 910 F.2d 652, 656 (9th Cir.
6 1990).

7 Here, the first, second, and third factors favor
8 dismissal of this case. Plaintiff's failure to keep the Court
9 informed of his address prevents the case from proceeding in the
10 foreseeable future. The fourth factor, as always, weighs
11 against dismissal. The fifth factor requires the Court to
12 consider whether a less drastic alternative is available.
13 Without Plaintiff's current address, however, certain
14 alternatives are bound to be futile. Here, as in Carey, "[a]n
15 order to show cause why dismissal is not warranted or an order
16 imposing sanctions would only find itself taking a round trip
17 tour through the United States mail." 856 F.2d at 1441.

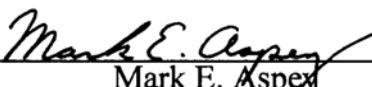
18 The Court finds that only one less drastic sanction is
19 realistically available. Rule 41(b) provides that a dismissal
20 for failure to prosecute operates as an adjudication upon the
21 merits "[u]nless the court in its order for dismissal otherwise
22 specifies." In the instant case, the Court finds that a
23 dismissal with prejudice would be unnecessarily harsh. The
24 Complaint and this action will therefore be dismissed without
25 prejudice pursuant to Rule 41(b) of the Federal Rules of Civil
26 Procedure.

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1 **IT IS THEREFORE RECOMMENDED** that, pursuant to Rule
2 41(b) and Rule 4(m), Federal Rules of Civil Procedure, this
3 action be dismissed without prejudice.

4 DATED this 16th day of July, 2008.

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8 Mark E. Asper
United States Magistrate Judge

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